IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 23, 2007 Session

STATE OF TENNESSEE v. PHEDREK T. DAVIS

Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-2992 Seth Norman, Judge

No. M2006-00198-CCA-R3-CD - Filed July 19, 2007

Following a jury trial, Defendant, Phedrek T. Davis, was found guilty of first degree premeditated murder, assault, and attempted second degree murder. Defendant was sentenced to life imprisonment for his first degree premeditated murder conviction. Following a sentencing hearing, the trial court sentenced Defendant as a Range II, multiple offender, to fifteen years for his attempted murder conviction and eleven months, twenty-nine days for his misdemeanor conviction. The trial court ordered Defendant to serve his attempted murder sentence consecutively to his life sentence, and the misdemeanor sentence concurrently with his other sentences, for an effective sentence of life plus fifteen years. On appeal, Defendant argues that (1) the evidence was insufficient to support his conviction of premeditated first degree murder and attempted second degree murder; (2) the trial court erred in its evidentiary rulings; (3) the trial court erred in its jury instructions; (4) the prosecutor's closing argument was improper; (5) the trial court erred in applying enhancement factors in determining the length of Defendant's sentence for attempted second degree murder; and (6) the trial court erred in imposing consecutive sentencing. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Kathleen G. Morris, Nashville, Tennessee; and Anne M. Davenport, Nashville, Tennessee, for the appellant, Phedrek T. Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and Renee Erb, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

Eula Beasley regularly visited the victim, Susan Phelps, at her apartment on McMillan Street. Mr. Beasley testified that he and Ms. Phelps were standing on the sidewalk outside Ms. Phelps' apartment on August 8, 2003, when Defendant approached them. Defendant asked Ms. Phelps why she had been in his apartment and then slapped her across the face. Mr. Beasley stated that Defendant said, "[B]itch, I'm going to get you, don't be in this house when I get back." Ms. Phelps did not respond, and she and Mr. Beasley returned to Ms. Phelps' apartment.

Four or five people had gathered in Ms. Phelps' living room. Mr. Beasley, who was standing by the open front door, saw Defendant walk toward Ms. Phelps' apartment at a fast pace approximately five to ten minutes after the encounter on the sidewalk. Mr. Beasley said that Defendant pulled out a gun and fired through the open living room window. Ms. Phelps was standing in front of the window. Mr. Beasley ran through the living room to a back room, broke the glass from a window with his arm and jumped out. He ran into the alley behind the apartment building and hid for a few minutes. Mr. Beasley observed Defendant drive down the alley in his car.

Mr. Beasley cut his leg when he jumped out of the window and was later transported to the hospital. Mr. Beasley said that Ms. Phelps went over to Defendant's apartment that afternoon to plug in an extension cord because the electricity was off in her apartment. Mr. Beasley identified Defendant at trial as the shooter.

On cross-examination, Mr. Beasley conceded that he went to Ms. Phelps' apartment to smoke crack cocaine, but he stated that he had not had an opportunity to do so before the shooting occurred. Mr. Beasley said that Defendant stood on the sidewalk after slapping Ms. Phelps for about ten seconds before walking around the side of the building.

George Boone testified that he was one of the group of people who had gathered in Ms. Phelps' apartment on August 23, 2003. Mr. Boone was standing by the front door when he observed Defendant approach Ms. Phelps on the sidewalk. Defendant called Ms. Phelps "a bitch," and said, "somebody got my stuff." Defendant slapped Ms. Phelps, and Ms. Phelps walked back toward her apartment. Mr. Boone said that Defendant came up to Ms. Phelps' front door and said, "Somebody got my [s___], you all need to get up out of here." Defendant said he was going to come back and "shoot this [m___ f___] up."

Mr. Boone said that the other people in the apartment were not worried, but Mr. Boone took Defendant's threat seriously. Mr. Boone went outside and stood in front of the victim's apartment. Mr. Boone said that he could see Ms. Phelps standing in front of the living room window. Defendant returned to Ms. Phelps' apartment between fifteen and thirty minutes later. Mr. Boone said that Defendant came up beside him, reached down into his pants, and pulled out a gun. Defendant shot into the living room window and then sprayed the front of the victim's apartment

with bullets. Defendant did not say anything to Mr. Boone. After discharging his weapon, Defendant went down the sidewalk, crossed a grassy area, got into his car, and drove away. Mr. Boone looked inside the apartment after Defendant left and saw Ms. Phelps lying on the floor on her back. Mr. Boone identified Defendant at trial as the shooter.

Officer William Kirby with the Metro Nashville Police Department arrived at Ms. Phelps' house at approximately 4:30 p.m. in response to a 911 call made about thirty minutes earlier. Officer Kirby said it was a sunny, bright afternoon. Officer Kirby testified that he stood in front of the apartment's living room window and was able to see through the apartment's interior to a back window. Officer Kirby said that he could see the images of the apartment's furnishings and a dog that was chained near the front door. There was no electricity in the apartment, and the apartment's living room window was open.

Officer Kirby identified and explained the photographs taken at the crime scene depicting, among other things, a bullet hole in the screen of the living room window, three bullet holes in the screen of the front bedroom window, bullet strikes on and around both windows, a bullet strike on the left frame of the front door, and two bullet holes inside the apartment in the drywall separating the front and back bedrooms. Officer Kirby testified that he believed that two of the bullets pierced the drywall and struck the back bedroom window. Six .40 caliber shell casings were strewn across the grassy area in front of the bedroom window and diagonal to the living room window. Lead bullet fragments were found near the coffee table in front of the living room window and by the back bedroom window. Copper bullet jackets were found in the kitchen and the bathroom.

Officer Kendall Jaeger, a firearm tool mark examiner with the Metro Nashville Police Department, testified that based upon his examination, the two bullets recovered from the crime scene were each fired from the same gun, the two copper bullet jackets were fired from the same gun, and the six shell casings found outside the victim's apartment were each fired from the same gun. Officer Jaeger could not conclusively state that only one gun fired all of the bullets, copper jackets, and shell casings because the police officers were unable to find the murder weapon for testing.

Sergeant Danny Collins, with the Metro Nashville Police Department, testified that he was unable to locate Defendant after a warrant was sworn out for his arrest until an individual called with information as to Defendant's whereabouts. Officer Roger Doak, with the Metro Nashville Police Department's intelligence division, set up a surveillance of the residence in which they believed Defendant was living, and Defendant was apprehended at that location on September 30, 2003.

Detective Roy Dunaway, with the Metro Nashville Police Department, was present when Defendant was brought in for booking. Detective Dunaway identified Defendant from a known photograph, and Defendant acknowledged his name. Defendant asked Detective Dunaway what "this was all about." Detective Dunaway told Defendant that he did not know anything "about the dude that you killed." Detective Dunaway said that Defendant responded, "it wasn't a dude, it was a lady."

On cross-examination, Detective Dunaway acknowledged that Defendant denied that he had killed anyone.

Dr. Stacy Turner, a medical examiner for Davidson County, reviewed the report of Ms. Phelps' autopsy. Dr. Turner said that Ms. Phelps was shot once on the left side of her face. The bullet entered the body at the junction of the nose and cheek, traveled to the right side of the neck, and perforated the right carotid artery. The wound did not reveal the presence of any soot or stippling indicating that the shooter was standing at an intermediate range. Dr. Turner said that a blood test revealed the presence of cocaine in Ms. Phelps' system, but Dr. Turner could not determine when the drug was ingested.

II. Motion to Sever

Defendant was indicted in a multiple count indictment for the assault and first degree premeditated murder of Ms. Phelps, the attempted first degree murder of Eula Beasley, the attempted first degree murder of Lester Gentry, and criminal impersonation. Prior to trial, the trial court denied Defendant's motion to sever the criminal impersonation charge from the other charges. At the conclusion of the State's case-in-chief, the trial court entered a judgment of acquittal as to the criminal impersonation charge and the charge involving Lester Gentry. Nonetheless, Defendant contends that he was prejudiced by the trial court's denial of his motion to sever because the State addressed the anticipated proof supporting the criminal impersonation offense in its opening statement and because the jury heard the charge during the reading of the indictment.

Generally, decisions concerning joinder and severance of offenses pursuant to Rules 8(b) and 14(b)(1) of the Tennessee Rules of Criminal Procedure are reviewed for an abuse of discretion. *Spicer v. State*, 12 S.W.3d 438, 442 (Tenn. 2000). As such, a trial court's decision to consolidate or to sever offenses will not be reversed unless the "'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)).

Rule 8(b) of the Tennessee Rules of Criminal Procedure allows multiple offenses to be joined if part of a common scheme or plan or if they are of the same or similar character. Rule 14 grants the accused the right to a severance of offenses permissibly joined under Rule 8(b) unless: (1) the offenses are part of a common scheme or plan, and (2) the evidence of one would be admissible upon the trial of the others. Tenn. R. Crim. P. 14(b)(1); *Spicer*, 12 S.W.3d at 443.

There are three categories of common scheme or plan evidence: (1) distinctive design or signature crimes; (2) a larger continuing plan or conspiracy; and (3) same criminal transaction. *State v. Moore*, 6 S.W.3d 235, 240 (Tenn. 1999). At the motion hearing, the State argued that the criminal impersonation charge was part of the same criminal transaction as the assault and murder charges. Defendant contended that the conduct supporting the criminal impersonation charge, which occurred on September 30, 2003, was too far removed in time and space from the other offenses, which

occurred on August 8, 2003, to be considered part of the same transaction. *See State v. Hallock*, 875 S.W.2d 285, 292 (Tenn. Crim. App. 1994) ("Same transaction" denotes crimes which occur within a single criminal episode.).

Nonetheless, based on our review of the record, we conclude that even if the trial court erred in not severing the criminal impersonation charge from the other charges, such error was clearly harmless. *See* Tenn. R. Crim. P. 52(a).

As a result of the trial court dismissing the criminal impersonation charge, the jury was not instructed as to the elements of this offense, nor did the State address the issue in its closing argument. At trial, the only evidence indicating that Defendant had initially lied to the arresting officers about his true identity came through Detective Dunaway's brief testimony. Detective Dunaway testified that he identified Defendant by means of a photograph when Defendant was brought in for booking. Detective Dunaway described the identification process as follows:

> Went to the booking area, I looked at him, looked at the photograph, and then showed the photograph to [Defendant], like this, (indicating) and I said this is you, this is not the name that you're giving. [Defendant] said yes, it is me.

The primary inquiry into whether a severance should be granted is "really a question of evidentiary relevance." *Moore*, 6 S.W.3d at 239. Admission of other crimes which tends to establish a common scheme or plan is proper to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue. *Id*. at 235 n.5. "'A defendant's attempts to evade arrest are relevant as circumstances from which, when considered with the other facts and circumstances as evidence, a jury can properly draw an inference of guilt.'" *State v. Caldwell*, 80 S.W.3d 31, 39-40 (Tenn. Crim. App. 2002) (quoting *State v. Zagorski*, 701 S.W.2d 808, 813 (Tenn. 1985)); *see also State v. Torian Dillard*, No. W2005-00152-CCA-R3-CD, 2006 WL 1044087, at *12 (Tenn. Crim. App., Apr. 19, 2006), *perm. to appeal denied* (Tenn. Sept. 5, 2006) (concluding that evidence that the defendant fled the scene of the crime and hid from the police for the next several weeks was one of the factors supporting the jury's finding of premeditation). Thus, evidence of the particular circumstances in this case surrounding Defendant's apprehension was relevant as raising an inference of guilt. *Caldwell*, 80 S.W.3d at 40.

In her opening statement, the prosecutor summarized the anticipated proof supporting the charge of criminal impersonation by stating that after Defendant was apprehended, "[h]e lie[d] to [to the arresting officers] about who he is. So they take him, as you would expect . . . to what they call their booking to book him in . . . [and] he kept telling them he was somebody else." By these comments, the prosecutor obviously anticipated that the proof supporting this charge would be stronger than that which was ultimately developed at trial.

Nonetheless, considering the overwhelming evidence supporting Defendant's convictions of the other charges as discussed below, and considering that the evidence supporting the criminal impersonation charge was admissible in the trial of the other charges, we conclude that any error on

the trial court's part in failing to sever the charge of criminal impersonation was harmless error. Defendant is not entitled to relief on this issue.

III. Motion to Suppress

Defendant argues that the trial court erred in denying his motion to suppress the statement he made to Detective Dunaway during the booking process. The Defendant contends that his statement was the result of custodial interrogation, or its functional equivalent, without the benefit of warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Defendant also submits that his arrest was illegal rendering any statement made after his arrest inadmissible and subject to suppression.

At the suppression hearing, Detective Dunaway testified that he was assigned the duty of identifying Defendant when he was brought in for questioning. Detective Dunaway acknowledged that he did not read Defendant his *Miranda* rights. Detective Dunaway testified:

> I was advised by my supervisor, sir, that they believed [Defendant], there was a homicide warrant outstanding for him, that he had been arrested, but giving a false name. I happened to be in the office, so I printed a picture out of him, and I went down to look to see if it was actually him or someone else. And when he saw the picture, he goes, yeah, it's me. So . . . I said, it was actually Detective David [Achord]'s case, and I said I'm going to give [Detective Achord] a call, would you be willing to give him a statement. [Defendant] said what's this all about. I said . . . all I know is it's a homicide warrant, and I'm sure he would like to talk to you . . . . I said, I don't know anything about the dude you killed. And [Defendant] said, it wasn't a dude, it was a lady. And that was the only contact I had with him.

Detective Dunaway said that Defendant denied that he had killed anyone and indicated a willingness to talk to Detective Achord. This brief exchange lasted approximately five minutes. Detective Dunaway said that he did not have any intention of eliciting information from Defendant because he did not know anything about the case. On cross-examination, Detective Dunaway said that he did not know if the victim of the homicide was a woman or a man.

At the conclusion of the suppression hearing, the trial court found that Detective Dunaway's conversation with Defendant was not the functional equivalent of questioning, and that Defendant's comment was voluntarily made. The trial court also found that Defendant had failed to establish that his arrest was pursuant to an invalid warrant. Accordingly, the trial court denied Defendant's motion to suppress.

The findings of fact made by the trial court at a hearing on a motion to suppress are binding upon an appellate court unless the evidence contained in the record preponderates against those findings. *State v. Saylor*, 117 S.W.3d 239, 244 (Tenn. 2003). As trier of fact, the trial court has the ability to assess the credibility of the witnesses, determine the weight and value to be afforded the

evidence, and resolve any conflicts in the evidence. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn.1996). As the prevailing party, the defendant is entitled to the strongest legitimate view of the evidence as well as to all reasonable inferences drawn from that evidence. *State v. Damron*, 151 S.W.3d 510, 515 (Tenn. 2004); *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001). However, we review the trial court's conclusions of law de novo. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000).

A. Affidavit of Arrest Warrant

Defendant contends that the affidavit supporting the arrest warrant is defective because it fails to state the basis of Detective Achord's knowledge of Defendant's involvement in the crimes, and, therefore, the statement he gave following his arrest should be suppressed as the fruit of an illegal arrest.

The affidavit attached to the warrant for Defendant's arrest stated:

> On [August 21, 2003], the victim was at 321 McMillan Street, Nashville, Tennessee. She was approached by the accused. He accused her of stealing his property, which he had left in an abandoned apartment. He slapped the victim, and then threatened to return and kill everyone. The accused left. He returned a short time later, armed with a semiautomatic handgun. He pointed the weapon toward the victim and began firing. The victim sustained a gunshot wound to the face. She was transported to Vanderbilt Emergency Room, where she was pronounced deceased.

Arrest warrants may only issue upon a showing of probable cause. *State v. Lewis*, 36 S.W.3d 88, 97 (Tenn. Crim. App. 2000) (citations omitted); *State v. Tays*, 836 S.W.2d 596, 600 (Tenn. Crim. App. 1992). Rule 4(a), Tenn. R. Crim. P., provides in pertinent part:

> Issuance of Warrant or Summons.--If the affidavit of complaint and any supporting affidavits filed with it establish that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate or clerk shall issue an arrest warrant to an officer authorized by law to execute it.... Before ruling on a request for a warrant, the magistrate or clerk may examine under oath the complainant and any witnesses the complainant produces.

The magistrate's or clerk's finding of probable cause "shall be based on evidence which may be hearsay in whole or in part provided there is a substantial basis to believe (1) the source of the hearsay to be credible; and (2) there is a factual basis for the information furnished." Tenn. R. Crim. P. 4(b). Probable cause is "a reasonable grounds for suspicion, supported by circumstances indicative of an illegal act." *State v. Henning*, 975 S.W.2d 290, 294 (Tenn. 1998) (citing *Lea v. State*, 181 Tenn. 378, 381, 181 S.W.2d 351, 352 (1944)).

Before a valid arrest warrant can issue, the judicial officer issuing the warrant must be supplied with sufficient information to support an independent judgment that probable cause exists

for the warrant. *State v. Carter*, 160 S.W.3d 526, 533 (Tenn. 2005). A factually sufficient basis for the probable cause judgment must appear within the affidavit of the complaint. If hearsay evidence is relied upon, the basis for the credibility of both the informant and the informant's information must also appear in the affidavit. *Spinelli v. U.S.*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). Citizens who witness crimes or relevant events, however, are presumed to be reliable for probable cause purposes. *See State v. Williams*, 193 S.W.3d 502, 507 (Tenn. 2006) (citing *State v. Melson*, 638 S.W.2d 342, 354-56 (Tenn. 1982)); *State v. Smith*, 867 S.W.2d 343, 346-48 (Tenn. Crim. App. 1993).

The affidavit at issue does not identify the source of the affiant's knowledge although it may reasonably be inferred that the information was based on Detective Achord's investigation of the crime. Nonetheless, despite the affidavit's inartful draftsmanship, an arrest warrant is not required in order to effectuate an arrest for a felony offense. *Lewis*, 36 S.W.3d at 97 (citing T.C.A. § 40-7-103(a)(3)).

A police officer may make a warrantless arrest "when a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested has committed the felony." T.C.A. § 40-7-103(a)(3). "Accordingly, the proper inquiry . . . is not whether the warrant was lawful, but whether the arrest itself was lawful." *Lewis*, 36 S.W.3d at 97 (citing *Harris v. State*, 206 Tenn. 276, 287, 332 S.W.2d 675, 680 (1960); *Daugherty v. State* 478 S.W.2d 921, 922 (Tenn. Crim. App. 1972)). Courts should determine the existence of probable cause after assessing all of the information available to the officer at the time of arrest. *See State v. Woods*, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990). This court may consider the proof at trial, as well as at the suppression hearing, when considering the appropriateness of the trial court's ruling on a pretrial motion to suppress. *See State v. Henning*, 975 S.W.2d 290, 299 (Tenn.1998) (holding that because the rules of appellate procedure "contemplate that allegations of error should be evaluated in light of the entire record," an appellate court "may consider the proof adduced both at the suppression hearing and at trial").

Detective Achord testified at trial that he was the lead investigator assigned to the case and arrived at the crime scene approximately ten to fifteen minutes after the police dispatcher received a call about the shooting. Detective Achord interviewed the people who were present when the shooting occurred, including Mr. Boone, and he interviewed Mr. Beasley in the hospital. There is nothing in the record to indicate that the eyewitnesses were acting as criminal informants in reporting their observations to the investigating officers. *See Lewis*, 36 S.W.3d at 98-99 (noting that no further showing is necessary regarding the basis of knowledge or veracity of a witness who was a resident of the neighborhood in which the crime occurred).

Our Supreme Court has defined "probable cause" as "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." *Henning*, 975 S.W.2d at 294. Based on our review, although the affidavit of complaint should have set forth the basis of Detective Achord's knowledge, we conclude that the information developed during the initial investigation of the crime supports a finding of probable cause for Defendant's arrest. Upon a showing of probable cause to

believe that a crime has been committed and that the suspect of the investigation committed that crime, a custodial arrest may properly be made. *State v. Crutcher*, 989 S.W.2d 295, 300 (Tenn.1999). Thus, the trial court did not err in denying Defendant's motion to suppress his statement to Detective Dunaway on the basis of an illegal arrest. Defendant is not entitled to relief on this issue.

B. Statement to Detective Dunaway

It is clear from the record that the Defendant's statement to Detective Dunaway was made while Defendant was in custody and after his Sixth Amendment rights had attached. Detective Dunaway testified that he did not inform Defendant of his *Miranda* rights prior to speaking with him. Relying of *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), Defendant contends that Detective Dunaway knew or should have known that his comments to Defendant would produce an incriminating response.

In *Innis*, the Supreme Court concluded:

> that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Id. at 301, 100 S. Ct. at 1689-90.

The determination of whether Defendant's statement was made in response to an improper police interrogation involves questions of both fact and law, which this court reviews *de novo. See generally State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999) (citing *Harries v. State*, 958 S.W.2d 799, 802 (Tenn. Crim. App. 1997) (cases that involve mixed questions of law and fact are subject to *de novo* review)); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997).

This Court has previously observed that "[t]here is a difference between police initiated custodial interrogation and communications, exchanges, or conversations initiated by the accused himself." *State v. Land*, 34 S.W.3d 516, 524 (Tenn. Crim. App. 2000) (citing *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)). There is no constitutional protection from statements volunteered by the accused. *Edwards*, 451 U.S. at 484, 101 S. Ct. at 1880. "At the very least, the police must have asked a question that was 'probing, accusatory, or likely to elicit an incriminating response' before a court may conclude that there was interrogation." *Land*, 34 S.W.3d at 524.

As this Court observed in *Land*,

> [s]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response. *Innis*, 446 U.S. at 301, 100 S. Ct. at 1689. Additionally, where a defendant makes a statement without being questioned or pressured by a government agent, the statement is admissible, if the statement was freely and voluntarily made by the defendant. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473 (1986); *Michigan v. Tucker*, 417 U.S. 433, 441, 94 S. Ct. 2357, 2362, 41 L. Ed. 2d 182 (1974).

Id. at 524-25.

Detective Dunaway testified at the suppression hearing that he was on duty when Defendant was brought in for booking. Detective Dunaway printed out a current photograph of Defendant and carried it with him to the booking office to identify Defendant, whom the arresting officers believed was using a false name. Detective Dunaway did not expressly question Defendant about the crime; he merely responded to Defendant's inquiry concerning the reason why he was arrested. Nor can it be said that Detective Dunaway should have known that this brief exchange with Defendant was reasonably likely to elicit an incriminating response from Defendant or that Detective Dunaway even expected any response to his conversation.

Based on our review, we conclude that Defendant's statement was not the product of an unconstitutional custodial interrogation. Accordingly, we conclude that the trial court did not err in denying Defendant's motion to suppress on this basis. Defendant is not entitled to relief on this issue.

IV. Sufficiency of the Evidence

Defendant does not challenge the sufficiency of the evidence supporting his assault conviction. Defendant argues on appeal that the evidence was insufficient to support his convictions of first degree premeditated murder and attempted second degree murder. Defendant contends that the evidence failed to establish that he knew anyone was in the apartment when he discharged his gun, and thus the State failed to prove that Defendant acted with the requisite criminal intent. Defendant further argues that the forensic evidence suggests that a second shooter was inside Ms. Phelps' apartment, and the State thus failed to prove beyond a reasonable doubt the it was Defendant who committed the offenses against Ms. Phelps and Mr. Beasley.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the

burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.; State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Accordingly, in a bench trial, the trial judge, as the trier of fact, must resolve all questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). The trial judge's verdict carries the same weight as a jury verdict. *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Defendant was convicted of the premeditated murder of Ms. Phelps and the attempted second degree murder of Mr. Beasley. As relevant here, first degree murder is defined as "a premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1). The offense of second degree murder is defined as "[a] knowing killing of another." *Id*. § 39-13-210(a)(1). "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." *Id*. § 39-12-101(a)(3). "Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense." *Id*. § 39-12-101(b).

A premeditated act is one "done after the exercise of reflection and judgment." *Id*. § 39-13-202(d). A finding of "premeditation" requires that:

> the intent to kill must [be] formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id.

The element of premeditation is a question of fact to be resolved by the jury and may be established by proof of the circumstances surrounding the killing. *State v. Suttles*, 30 S.W.3d 252, 260 (Tenn. 2000). Circumstances from which premeditation may be inferred include the defendant's use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by a defendant of an intent to kill; the defendant's procurement of a weapon; a defendant's preparations prior to a killing for concealment of the crime; and calmness immediately after the killing. *State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997).

The killing must be intentional as well as premeditated. "'Intentional' refers to a person who acts intentionally with respect to ... a result of the [person's] conduct when it is the person's conscious objective or desire to ... cause the result." T.C.A. § 39-11-302(a).

Citing *State v. Wilson*, 924 S.W.2d 648 (Tenn. 1996), Defendant argues that the State failed to prove that he acted with the requisite criminal intent. In *Wilson*, our supreme court held that the evidence was insufficient to support an aggravated assault conviction because there was no basis for finding that the defendant, who fired two shots into a residence after having an angry, verbal confrontation with the owner of the residence two days earlier, knew that the residence was occupied. Thus, the State failed to prove that the defendant acted knowingly or intentionally in causing the victims to reasonably fear imminent bodily injury. *Id*. at 651.

Viewing the evidence in a light most favorable to the State, however, the facts presented in *Wilson* are clearly distinguishable from those in the case *sub judice*. Both Mr. Beasley and Mr. Boone testified that Defendant approached Ms. Phelps on the sidewalk and slapped her across the face after engaging in an angry verbal confrontation. Although Defendant's exact words varied according to the trial testimony, Mr. Beasley and Mr. Boone testified that Defendant threatened to shoot at Ms. Phelps' residence and warned Ms. Phelps not to be there when he came back. Mr. Boone said that he was standing outside Ms. Phelps' apartment and could see Ms. Phelps standing in front of the living room window. Mr. Beasley and Mr. Boone both observed Defendant return to Ms. Phelps' apartment a few minutes after the confrontation on the sidewalk. Mr. Boone said that Defendant stood beside him, pulled out a gun and shot into the open living room window, then sprayed the front of the apartment with bullets from right to left. Mr. Boone stated that after the shooting, Defendant left the crime scene and drove off in his car. Based on our review, we conclude that the evidence was sufficient to support a finding that Defendant acted with the requisite *mens rea* to cause the result of his conduct.

Defendant contends that the forensic evidence "strongly suggests" the possibility that there was a second shooter inside the house. Defendant bases this theory on the fact that Officer Kirby could not testify with certainty that the lead bullet core found in front of the back bedroom window was fired from outside the apartment. Because the lead bullet core found in the living room and the lead bullet core found in the back bedroom were fired from the same gun, Defendant surmises that these bullets were fired from inside the house.

This Court may not substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn.2002) (citing *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn.2000); *Liakas v. State*, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956)). Viewing the evidence in a light most favorable to the State, Officer Kirby testified that all of the shell casings found in the grassy area in front of Ms. Phelps' apartment were fired from the same gun. Mr. Boone and Mr. Beasley testified that Defendant shot through the open living room window where Ms. Phelps was standing and then through the front bedroom window. Mr. Beasley was standing by the open front door in the zone of danger when Defendant commenced firing. There was no evidence that anyone inside Ms. Phelps' apartment was armed at the time of the shooting.

Based on our review of the record, we conclude that a rational trier of fact could find beyond a reasonable doubt that Defendant was guilty of the first degree premeditated murder of Ms. Phelps and the attempted second degree murder of Mr. Beasley. Defendant is not entitled to relief on this issue.

V. Evidentiary Rulings

A. Standard of Review

The admissibility of evidence is generally within the sound discretion of the trial court. *State v. Saylor*, 117 S.W.3d 239, 247 (Tenn. 2003). The threshold determination is whether or not the proffered evidence is relevant. Pursuant to Rule 401 of the Tennessee Rules of Evidence, evidence is deemed relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See State v. Forbes*, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995). Even relevant evidence, however, may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. "When arriving at a determination to admit or exclude even that evidence which is considered relevant, trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal when there is a showing of abuse of discretion." *Saylor*, 117 S.W.3d at 247.

B. Reference to Companion

Prior to trial, the trial court granted Defendant's motion in limine seeking to prohibit the State from introducing evidence that Herschel Olstein, the man who was with Defendant at the time Defendant was apprehended, had an outstanding warrant for murder in Texas. Over Defendant's objection, Sergeant Collins testified as follows:

> [My] involvement [in Defendant's case] came in through another case we were working . . . [I] [r]eceived a call on another individual that another department had an interest in. I took the information, was given an address. I sent that information to our intelligence unit, had a unit that attempted to locate people, they did surveillance.

Defendant argues that Sergeant Collins' reference to another individual who was of interest to the police was irrelevant and prejudicial. Defendant contends that the State was attempting to create an inference of guilt by association. *See Uphaus v. Wyman*, 360 U.S. 72, 79, 79 S. Ct. 1040, 1046, 3 L. Ed. 2d 1090 (1959) (observing that the theory of "guilt by association" has been "thoroughly discredited").

Sergeant Collins' comments were brief and general in nature, giving no indication of Defendant's connection to the other individual or the type of interest the police department had in

the individual. Sergeant Collins' testimony was relevant to explain how the police officers were able to locate Defendant a month after the commission of the crimes. Based on our review of the case *sub judice*, we conclude that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

C. Impeachment of State's Witness

Defendant argues that the trial court impermissibly restricted his cross-examination of Mr. Beasley in violation of his Sixth Amendment right to confront the witnesses against him.

The trial court conducted a hearing outside the presence of the jury to determine which of Mr. Beasley's prior convictions could be used by defense counsel to impeach Mr. Beasley's credibility. During the hearing, defense counsel made an offer of proof concerning certain charges against Mr. Beasley which had been incurred and dismissed after Defendant was indicted on the current charges. These charges, all misdemeanors, included four assault charges, one criminal trespass charge, and two charges of vandalism of property valued at less than $500.00.

At the hearing, Defendant conceded that these charges were not admissible under Rule 609 of the Tennessee Rules of Evidence but argued that the evidence was admissible under Rule 616 to show the witness's bias. *See* Tenn. R. Evid. 609 and 616. Defendant contended that the jury could infer that the misdemeanor charges were dismissed in exchange for Mr. Beasley's testimony. The State acknowledged at the hearing that defense counsel could establish the existence of any promises of leniency by simply asking Mr. Beasley if any such promises had been made, but defense counsel did not do so. The trial court found the evidence inadmissible under rule 616 because defense counsel failed to offer any proof that the dismissal of the charges was in exchange for Mr. Beasley's testimony.

"A defendant's right to examine a witness to impeach his or her credibility or to establish that the witness is biased includes the right to examine a witness regarding any promises of leniency, promises to help the witness, or any other favorable treatment offered to the witness." *State v. Rice*, 184 S.W.3d 646, 670 (Tenn. 2006) (citing *State v. Sayles*, 49 S.W.3d 275, 279 (Tenn. 2001)). The exposure of a witness's motivation in testifying is a proper and important function of cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674 (1986); *see also* Tenn. R. Evid. 616 ("A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness."). "An undue restriction of this right may violate a defendant's right to confrontation under the Sixth Amendment of the United States Constitution and Article I, Section 9, of the Tennessee Constitution." *Sayles*, 49 S.W.3d at 279 (citing *Smith*, 893 S.W.2d at 924; *State v. Black*, 815 S.W.2d 166, 177 (Tenn. 1991)).

We conclude that the trial court erred by not allowing Defendant to cross-examine Mr. Beasley about whether the charges were dismissed in exchange for him being a cooperative witness for the State. *Rice*, 146 S.W.3d at 670. However, in light of the thorough cross-examination and

the extensive impeaching evidence allowed, we hold that the error was harmless. Tenn. R. Crim. P. 52(a). Defendant is not entitled to relief on this issue.

D. Rule 612 Violation

Defendant argues that the State improperly used Mr. Beasley's statement to the police to refresh his recollection of the events. During his direct examination, Mr. Beasley testified that he was "not one hundred percent positive" that Defendant had used the word "kill" when he threatened to return to Ms. Phelps' apartment with a gun. The State handed Mr. Beasley a copy of his statement to the police and instructed Mr. Beasley to read the document. The trial court denied Defendant's request that the State take the statement back after Mr. Beasley had read it. The following colloquy then occurred:

[STATE]:	Okay. Mr. Beasley, did you get a chance to read [the statement] over.
[MR. BEASLEY]:	Yes, ma'am.
[STATE]:	Okay. Now, what, if anything, did you tell the police about [Defendant] saying the things he said to her?
[MR. BEASLEY]:	I didn't hear you.
[STATE]:	What did you tell the police that [Defendant] said to the [victim]?
[MR. BEASLEY]:	That he was going to kill her when he come [sic] back, he was going to shoot up the house and everything.
[STATE]:	Okay. But you did tell them he said he was going to kill her?
[MR. BEASLEY]:	Yes, ma'am.
[STATE]:	Well, did he say that?
[MR. BEASLEY]:	Yes, ma'am, I think so.
[STATE]:	Okay. Was that why you told the police that?
[MR. BEASLEY]:	Yes, ma'am.
[STATE]:	Now, how many days was it after everything happened that you talked to the police?

[MR. BEASLEY]: I talked to them the same day when I went to the hospital.

[STATE]: When you went to the hospital, okay. All right. You can go ahead and give [the statement] back to me then. Thank you.

Tennessee Rules of Evidence 612 and 613 establish the circumstances and procedures for refreshing the memory of a witness using a prior statement of the witness. The Advisory Commission Comments on Rule 612 provides that:

> [o]nly if a witness's memory requires refreshing should a writing be used by the witness. The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory.

Tenn. R. Evid. 612, Advisory Commission Comments; *State v. Mathis*, 969 S.W.2d 418, 421 (Tenn. Crim. App. 1997).

Defendant argues first that the State failed to establish that Mr. Beasley's memory needed refreshing. "In other words, to justify the use of a writing to refresh a testifying witness's recollection pursuant to Rule 612, an attorney must demonstrate that it is necessary to refresh the witness's memory and that the writing will provide the necessary refreshing." *State v. Dennis Pylant*, No. M2001-02335-CCA-R3-CD, 2003 WL 21051740, at *9 (Tenn. Crim. App., at Nashville, May 8, 2003), *perm. to appeal denied* (Tenn. Oct. 27, 2003). Mr. Beasley testified on direct examination that he was "not positive" that Defendant said anything about killing the victim, but "it might have been something like that." Although Mr. Beasley did not specifically state that he did not remember what Defendant said, his testimony demonstrates that he had an insufficient recollection to testify fully about what Defendant told the victim. Thus, the State showed the necessary factual foundation needed to refresh the witness' memory.

Defendant argues that the State failed to follow the proper procedure outlined in Rule 612 because Mr. Beasley was allowed to retain the recorded statement while he was testifying. There is no indication, however, that Mr. Beasley read from the transcript of his statement while testifying, and, indeed, he continued to equivocate over whether Defendant had used the word "kill" in his threat even when shown his former statement. Accordingly, we conclude that any error in allowing Mr. Beasley to retain his prior statement was harmless. *See State v. Price*, 46 S.W.3d 785, 814 (Tenn. Crim. App. 2000).

E. Impeachment of Investigating Officer

Detective E.J. Bernard, with the Metro Nashville Police Department, took Mr. Beasley's statement during the investigation of the killing and reduced Mr. Beasley's oral statements to writing. During the trial of the case *sub judice*, a newspaper article reported that Detective Bernard was currently under investigation by the police department in response to an allegation that Detective

Bernard had falsified a report in another unrelated case. The trial court denied, on relevancy grounds, defense counsel's request to bring this information to the jury's attention. Defendant contends that Detective Bernard is the "declarant" of Mr. Beasley's written statement for purposes of Rule 806 of the Tennessee Rules of Evidence. Defendant thus argues that the trial court erred in not allowing him to impeach the credibility of Detective Bernard's written memorialization of Mr. Beasley's statement. Defendant's reliance on Rule 806, however, is misplaced. A declarant is a person who makes a "statement" which is defined as "an oral or written assertion." Tenn. R. Evid. 801. Mr. Beasley is considered the declarant of the oral assertions which were later reduced to writing. Thus, Rule 806 is not applicable.

Mr. Beasley testified on redirect examination that he had reviewed his written statement a few weeks before trial and confirmed its accuracy. At no time did Mr. Beasley indicate that any portion of his statement had been incorrectly recorded. The trial court did not err in excluding the proffered evidence on relevancy grounds. Defendant is not entitled to relief on this issue.

F. Limitation on Cross-Examination of Detective Achord

Defendant argues that the trial court erred in not permitting him to cross-examine Detective Achord about the statement Roxie Whitson made to him immediately after the shooting. Detective Achord acknowledged that at least one of the people who had been in Ms. Phelps' apartment when the incident occurred appeared to be upset. The following colloquy occurred:

[DEFENSE COUNSEL]: That one of them – Wait just one moment. One of them appeared to be pretty shaken?

[DETECTIVE ACHORD]: She was upset.

[DEFENSE COUNSEL]: Shoot the building is what Roxy Whitson told you.

The trial court sustained the State's objection to this line of questioning. Defendant did not offer any argument in support of the introduction of the evidence and continued Detective Achord's cross-examination on a different topic.

Defendant argued in his motion for new trial and now on appeal that Ms. Whitson's hearsay statement to Detective Achord that Defendant "shot the building" was admissible under the excited utterance exception to the hearsay rule. *See* Tenn. R. Evid. 803(2). "When . . . a party abandons the ground asserted when the objection was made and asserts completely different grounds in the motion for a new trial and in this Court, the party waives the issue." *State v. Adkisson*, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994). In the case *sub judice*, Defendant did not offer any basis for admitting the hearsay evidence at trial when given the opportunity to do so. Accordingly, we conclude that Defendant has waived this issue. Moreover, the proffered hearsay statement of Ms. Whitson was cumulative to the other testimony of the State's witnesses, and any error on the part of the trial court in excluding this evidence was harmless. *See* Tenn. R. Crim. P. 52(a).

VI. Jury Instructions

A. Sequential Jury Instructions

Defendant challenges the constitutionality of the trial court's sequential instructions to the jury on the charged offenses and their lesser included offenses. Defendant contends that the "acquittal first" instructions "impermissibly intrudes upon the independence of jury deliberations." Defendant also submits that *State v. Mann*, 959 S.W.2d 503, 521 (Tenn. 1997)(appendix) which upheld sequential instructions has been effectively overruled by *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999) and its progeny.

The trial court charged the jury with first degree premeditated murder of Susan Phelps, and the lesser included offenses of attempted first degree murder, second degree murder, attempted second degree murder, voluntary manslaughter, aggravated assault, attempted voluntary manslaughter, reckless homicide, criminally negligent homicide, simple assault, and misdemeanor reckless endangerment. For the charged offense of attempted first degree premeditated murder of Eula Beasley, the trial court charged the jury on the lesser included offenses of attempted second degree murder, attempted voluntary manslaughter, and misdemeanor reckless endangerment.

The trial court instructed as to each offense:

> On the other hand, if you find the defendant not guilty of [offense], as charged in count [__] of the indictment, or if you have a reasonable doubt thereof, then you must acquit the defendant of this charge and your verdict must be "not guilty" as to this offense. You must then consider the lesser included offense of [offense].

In *Burns*, our Supreme Court observed that the "Tennessee criminal code is structured to define offenses and assign degrees of punishment by determining the completion of the crime, the culpability of the individual criminal actor, and the degree of perceived harm to the victim or society as a whole." *Burns*, 6 S.W.3d at 466. To preclude the jury's consideration of the applicable lesser included offenses creates a risk that the jury will be forced "into an 'all or nothing' decision that, unfortunately, is likely to be resolved against the defendant, who is clearly guilty of something." *Id*. The *Burns* court established a two-part test for determining whether a particular offense is a lesser included offense of another in a particular case. As Defendant points out, failure to instruct the jury on a particular lesser included offense may constitute reversible error based upon the facts and circumstances presented in the particular case. *See State v. Ely*, 48 S.W.3d 710, 727 (Tenn. 2001).

Essentially, Defendant contends that *Mann* makes superfluous an instruction on otherwise applicable lesser included offenses, because such offenses are only available for consideration if the jury first finds the defendant not guilty beyond a reasonable doubt of the greater offense. Yet, Defendant submits that the *Ely* court found reversible error in the failure to charge appropriate lesser included offenses notwithstanding the jury's finding of guilt beyond a reasonable doubt on the greater charged offense.

Defendant makes the intellectually logical argument that if "acquittal first" sequential jury instructions, as given here, are appropriate, then it could *never* be reversible error for a trial court to fail to charge a lesser included offense(s). That is, if a conviction for a greater offense is being appealed, and the trial court gave an "acquittal first" sequential jury instruction, the jury, following the trial court's instructions, (as is presumed, *State v. Robinson*, 146 S.W.3d 469, 494 (Tenn. 2004), would never get to the situation of considering the omitted lesser included offense because the jury had not "acquitted" the defendant of the greater offense. Hence, no prejudice, and the error would clearly be harmless beyond a reasonable doubt. Defendant asserts that sequential instructions therefore interfere with a jury's choice to consider lesser included offenses deemed appropriate under *Burns*.

The issues raised in *Burns* and *Ely* were prompted by the trial court's failure to charge the jury with appropriate lesser included offenses. In *Ely*, for example, the trial court charged the jury only as to the offense of felony murder, raising the concern of an "all or nothing verdict" explored in *Burns*. In the case *sub judice*, however, the trial court provided instructions on the applicable lesser included offenses for each charged offense.

In *State v. Mann*, our Supreme Court affirmed this Court's approval of sequential instructions and printed that portion of this Court's opinion as an appendix. *Mann*, 959 S.W.2d at 517, 52. In *Mann*, we observed "[that] this Court has repeatedly upheld 'acquittal-first' instructions." Mann 959 S.W.2d at 521 (citing *State v. Raines*, 882 S.W.2d 376, 381-82 (Tenn. Crim. App.1994); *State v. McPherson*, 882 S.W.2d 365, 375 (Tenn. Crim. App.1994); *State v. Rutherford*, 876 S.W.2d 118, 119-20 (Tenn. Crim. App.1993); *see also State v. Jerry Dale Tigner, Jr.*, No. W2004-01935-CCA-R3-CD, 2005 WL 2259252, at *6 (Tenn. Crim. App., at Jackson, Sept. 15, 2005), *perm. to appeal denied* (Tenn. Jan. 30, 2006); *State v. Augustine John Lopez, III*, No. M2003-02307-CCA-R3-CD, 2005 WL 1521826, at *9 (Tenn. Crim. App. at Nashville, June 28, 2005), *perm. to appeal denied* (Tenn. Dec. 5, 2005); *State v. Stanley Earl Cates*, No. E2003-02648-CCA-R3-CD, 2204 WL 2951976, at *9-10 (Tenn. Crim. App., at Knoxville, Dec. 20, 2004), *no perm. to appeal filed*; *State v. Joe A. Gallaher*, No. E2001-01876-CCA-R3-CD, 2003 WL 21463017, at *5 (Tenn. Crim. App., at Knoxville, June 25, 2003), *no perm. to appeal filed*.

We are bound by published precedent. *See* Tenn. S.Ct. R. 4(H)(2). Therefore, based on controlling authority, we conclude that the trial court did not err in giving sequential instructions to the jury on the charged offenses and their lesser included offenses. Defendant is not entitled to relief on this issue.

B. Failure to Charge Lesser Included Offense

Defendant argues that the trial court erred in not charging felony reckless endangerment as a lesser included offense of first degree premeditated murder and attempted first degree premeditated murder. Defendant acknowledges that he did not request such an instruction in writing. *See* T.C.A. § 40-18-110(c) (2005)(providing that absent a written request for an instruction on a lesser included offense, the failure of the trial court to instruct the jury on the lesser included offense is not available

as a ground for relief either in a motion for new trial or on appeal). Defendant, however, asks this Court to review his issue as plain error. *See State v. Page*, 184 S.W.3d 223, 226 (Tenn.2006) (noting that because the defendant failed to file a written request asking the trial court to instruct the jury on the lesser included offense of attempted especially aggravated robbery, this issue is waived on appeal unless it rises to the level of plain error).

Defendant contends that the evidence clearly supports a finding that a gun was shot toward the apartment in which Ms. Phelps and Mr. Beasley were located thus warranting an instruction on the offense of felony reckless endangerment.

"When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. Crim. P. 52(b). The factors to be considered when deciding whether an error constitutes "plain error" in the trial are: "'(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do "substantial justice."'" *State v. Smith*, 24 S.W.3d 274, 282 (Tenn.2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App.1994)).

In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the [proceedings]," and "recognition should be limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial." *Adkisson*, 899 S.W.2d at 642. "All five factors must be established by the record before" an appellate court may "recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Smith*, 24 S.W.3d at 283.

It is well established that "[a] trial court has the duty to instruct the jury 'on all lesser-included offenses if the evidence introduced at trial is legally sufficient to support a conviction for the lesser offense.'" *State v. Rush*, 50 S.W.3d 424, 427-28 (Tenn. 2001) (quoting *State v. Langford*, 994 S.W.2d 126, 128 (Tenn.1999)). When an issue is raised regarding the trial court's failure to instruct on a lesser-included offense, we must determine: (1) whether the offense is a lesser-included offense under the test adopted in *State v. Burns*, 6 S.W.3d 453 (Tenn.1999); (2) whether the evidence supports an instruction on the lesser-included offense; and (3) whether the failure to instruct on the lesser-included offense constitutes harmless error. *State v. Allen*, 69 S.W.3d 181, 187 (Tenn.2002).

Under the test adopted in *Burns*, an offense is a lesser-included offense if:

(a) all of its statutory elements are included within the charged offense; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing:

> (1) a different mental state indicating a lesser kind of culpability; or
>
> (2) a less serious harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of facilitation, attempt or solicitation of the offense charged.

Id. at 466-67.

If an offense is determined to be a lesser included offense under the foregoing analysis, the trial court must then determine "whether any evidence exists that reasonable minds could accept as to the lesser included offense." *Id*. at 469. If, however, "a lesser offense is not included in the offense charged, then an instruction should not be given, regardless of whether evidence supports it." *Id*. at 467.

First degree murder is the premeditated and intentional killing of another. T.C.A. § 39-13-202(1). "The reckless endangerment statute provides that a person commits felony reckless endangerment if he or she (1) recklessly (2) 'engages in conduct which places or may place another person in imminent danger of death or serious bodily injury' and (3) a deadly weapon is used." *Rush*, 50 S.W.3d at 431(citing T.C.A. § 39-13-103(a), (b)).

In *Rush*, our supreme court determined that the offense of felony reckless endangerment is not a lesser included offense of attempted second degree murder. The court concluded:

> [b]ecause proof of use of a deadly weapon is always required for a felony reckless endangerment conviction but is not required for an attempted second degree murder conviction, and because the deadly weapon element does not reflect an intent requirement indicating lesser culpability or a less serious risk of harm, neither part (a) nor part (b) of the *Burns* test is satisfied.

Id.

Although *Rush* involved an attempt to commit second degree murder, the lesser included offense analysis necessarily begins with the statutory elements of the completed crime. *Burns*, 6 S.W.3d at 467; *State v. John C. Walker, III*, No. M2005-01432-CCA-RM-CD, 2005 WL 1798758, at *9 n.11 (Tenn. Crim. App., at Nashville, July 28, 2005), *perm. to appeal denied* (Tenn. Dec. 19, 2005). Proof of use of a deadly weapon is not required to support a first degree premeditated murder conviction, and "the deadly weapon element does not reflect an intent requirement indicating lesser culpability or a less serious risk of harm." *Rush*, 50 S.W.3d at 431. Thus, under a *Rush* analysis, felony reckless endangerment is not a lesser included offense of first degree premeditated murder under either part (a) or part (b) of the *Burns* test. Thus, we conclude Defendant has failed to show

that a substantial right has been adversely affected by the omission of the offense of felony reckless endangerment from the jury instructions. Defendant is not entitled to relief on this issue.

C. Erroneous Jury Instruction

Defendant argues that the trial court's instruction to the jury on the order of consideration of lesser included offenses was so erroneous that it deprived him of his constitutional right to a correct and complete charge of the law. The trial court instructed the jury as follows:

> On the other hand, if you find the defendant not guilty of [offense], or if you have reasonable doubt thereof, then you must acquit the defendant of this charge and your verdict must be "not guilty" as to this offense. You must then consider the lesser included offense of [offense].

This instruction is repeated sequentially for each charged offense and its respective lesser included offenses. As Defendant points out, the trial court's instruction deviates from the pattern jury instruction. Tennessee Pattern Jury Instruction 41.01 suggests the following instruction be provided when the offense charged contains more than one lesser-included offense:

> If you have a reasonable doubt as to the defendant's guilt of *[insert offense charged]* as charged in *[count of]* the indictment, then your verdict must be not guilty as to this offense, and then you shall proceed to determine *[his][her]* guilt or innocence of the lesser included offense of *[insert lesser included offense]*.

Defendant argues that the trial court's use of the phrase, "reasonable doubt thereof" which immediately follows the phrase, "not guilty," implies a reasonable doubt as to Defendant's innocence rather than his guilt.

We respectfully disagree. A trial court does not err by deviating from a pattern jury instruction, provided that the instruction given is accurate. *See State v. Hodges*, 944 S.W.2d 346, 354 (Tenn. 1997) (observing that pattern jury instructions are not controlling authority, and trial courts are not bound to their language); *State v. West*, 844 S.W.2d 144, 151 (Tenn. 1992) ("There is no requirement limiting a trial court to the use of 'pattern instructions.'"). A trial court is obligated to give a complete and accurate charge of the applicable law to the facts of the case. *State v. Stoddard*, 909 S.W.2d 454, 460 (Tenn. Crim. App. 1994) (citing *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975); *State v. Burkley*, 804 S.W.2d 458, 461 (Tenn. Crim. App. 1990). A reviewing court therefore reviews each jury charge to determine if the instruction fairly defined the legal issues involved and did not mislead the jury. *Robinson*, 146 S.W.3d at 521 (citing *State v. Hall*, 958 S.W.2d 679, 696 (Tenn. 1997)). When reviewing jury instructions on appeal to determine whether they are erroneous, this Court should "review the charge in its entirety and read it as a whole." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997).

The Tennessee Supreme Court, relying on the words of the United States Supreme Court, has noted that:

> jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (quoting *Boyde v. California*, 494 U.S. 370, 380-81, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990)).

The trial court instructed the jury:

> The law presumes that a defendant is innocent of the charge(s) against him or her. This presumption remains with a defendant throughout every stage of the trial, and it is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

Based on our review, we conclude that the trial court's instructions were clear, accurate, and complete, and we do not believe that the jury was misled as to the concept of reasonable doubt. Defendant is not entitled to relief on this issue.

VII. Prosecutorial Misconduct

Defendant argues that the prosecutor misstated the evidence and commented unfavorably on defense counsel's performance during closing argument. Specifically, Defendant contends that there was no evidence to support the prosecutor's argument that the bullet jacket found inside the house matched the bullet removed from the victim's body.

The Tennessee Supreme Court has long recognized that "'argument of counsel is a valuable privilege that should not be unduly restricted.'" *State v. Thomas*, 158 S.W.3d 361, 412 (Tenn. 2005) (quoting *Smith v. State*, 527 S.W.2d 737, 739 (Tenn. 1975)). "Nonetheless, such arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Goltz*, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003). Although counsel is generally given wide latitude, trial courts must restrict any improper argument. *Sparks v. State*, 563 S.W.2d 564 (Tenn. Crim. App.1978).

During closing argument, defense counsel argued that the bullet strikes found in the back bedroom could not have been made by Defendant because there was a wall and a bank of closets between the front bedroom window and the back bedroom window. Accordingly, defense counsel suggested that someone inside the victim's apartment discharged a weapon in response to the externally fired shots, and it was one of the inside bullets that struck and killed the victim.

The prosecutor addressed Defendant's theory of defense during rebuttal closing argument. The prosecutor pointed out all of the cartridges found at the crime scene were located outside the victim's apartment. After she was shot, based on the blood patterns on the floor, the victim had either crawled or been dragged from the living room into the kitchen where a bullet jacket was found. The prosecutor argued:

> And remember when the officer was testifying when you shoot somebody in the head or in the body sometimes a piece of it, the slug part, goes into the head and then the jacket part stays on the outside of the body. This is where they found [the victim][indicating the apartment's kitchen area] so the jacket part comes off, either in her hair or in her face. The slug went in the inside and killed her. That jacket matches the slug that was in her head.

Although the prosecutor is not permitted to misstate the evidence, he or she may present argument about any reasonable inferences which may be drawn from the evidence. *State v. McCary*, 119 S.W.3d 226, 253 (Tenn. Crim. App. 2003). Detective Jaeger testified that all six cartridges were found in the same general location outside the front bedroom window of the victim's apartment. All of the bullet jackets found inside the apartment were fired from the same gun, and all of the cartridges found outside the apartment were fired from the same gun. Detective Jaeger could not, however, state conclusively that the bullet jackets and the cartridges were fired from the same gun because he was not able to examine the gun itself in order to make that determination. Detective Jaeger acknowledged during his direct examination that the inconclusiveness of this aspect of his examination did not "leave out a common sense inference" that the bullet jackets and the cartridges were fired from the same firearm.

Based on the foregoing and our review of the record, we conclude that the prosecutor did not intentionally misstate the evidence. The prosecutor drew a reasonable inference about the relationship between the bullet jacket found next to the victim and the bullet core retrieved from her body in response to defense counsel's closing argument. Defendant is not entitled to relief on this issue.

The second category of challenged comments concerns the prosecution's responses to various aspects of defense counsel's argument which Defendant contends trivialized the defense counsel's trial function. The State submits that Defendant has waived any challenge to the second category of comments because he failed to lodge a contemporaneous objection. It is well settled that without a contemporaneous objection to a prosecutor's statements, the error is waived. *State v. Farmer*, 927 S.W.2d 582, 591 (Tenn. Crim. App. 1996) (citing *State v. Sutton*, 562 S.W.2d 820, 825 (Tenn.1978); *State v. Compton*, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982)). Defendant is not entitled to relief on this issue.

VIII. Sentencing Issues

Relying on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Defendant argues that the trial court impermissibly enhanced his sentence for his attempted second degree murder conviction by applying enhancement factors not found by the jury. Defendant also challenges the imposition of consecutive sentencing because the trial court ruled that consecutive sentencing was statutorily mandated upon the finding of certain aggravated factors.

At the sentencing hearing, the parties relied upon the proof adduced at the sentencing hearing and the presentence report. According to the presentence report, Defendant dropped out of school after completing the ninth grade. Defendant reported working at the Herbal Healing Center and Wendy's Old Fashioned Hamburgers at some point in 2000. Defendant stated that he began drinking alcohol when he was eleven years old and typically drank approximately a forty-ounce bottle of beer every other day. Defendant also first used marijuana at age eleven and smoked two or three blunts, sometimes laced with cocaine, every day. Defendant said that he participated in a court-ordered drug and alcohol addiction program from July 1998, until April 6, 1999, when he was terminated from the program as a result of a probation violation.

According to the presentence report, Defendant has approximately nineteen misdemeanor convictions and two Class C felony convictions for possession of cocaine, a Schedule II drug, in an amount less than 0.5 grams, in addition to numerous traffic violations. Defendant was sentenced to six years for his July 2, 1998 drug conviction, to be served in community corrections, which probation was revoked on April 6, 1999.

Teresa Lock and Juanita Matlock, Ms. Phelps' sisters, testified at the sentencing hearing concerning the effect of Ms. Phelps' death on them and other family members.

Dr. Pamela Auble, a clinical psychologist, testified on Defendant's behalf. Dr. Auble interviewed Defendant for seven hours over two days and administered nine standard tests. Dr. Auble said that Defendant did not know his biological father, and his maternal uncle provided Defendant with a father figure. Defendant's uncle, however, experienced difficulties with drug addiction. Defendant struggled in school, repeated several grades, and eventually dropped out after the ninth grade. Dr. Auble stated that Defendant's social and educational background led to the development of poor self-esteem and an inability to trust others, and placed Defendant at risk for substance abuse. Dr. Auble said that Defendant's verbal scale IQ was seventy-seven but acknowledged that he performed well on the non-verbal reasoning portion of the test. Dr. Auble stated that Defendant's method of coping with situations was to withdraw and keep himself apart from others.

On cross-examination, Dr. Auble said that she was contacted by defense counsel prior to trial to assess Defendant's mental status. Dr. Auble said that she concluded that Defendant was competent to stand trial. Dr. Auble acknowledged that Defendant's full scale IQ was "low average." Dr. Auble diagnosed Defendant with a "probable reading disorder, probable disorder of written expression, cannabis abuse in remission in a controlled environment, adjustment disorder with depressed mood and mixed personality disorder with paranoid anti-social and avoidance features."

Dr. Auble said that the characteristics of an anti-social personality varied among individuals, and acknowledged that the most successful treatment was growing older.

At the conclusion of the sentencing hearing, the trial court found that Defendant was a Range II multiple offender based on his two Class C felony drug convictions. *See* T.C.A. § 40-35-106. The trial court found that enhancement factors (2) and (9) were applicable based on Defendant's previous history of criminal convictions or behavior, and his violation of the conditions of his prior community corrections sentence. *See id*. § 40-35-114(2), (9). The trial court did not find any mitigating factors. Based on the foregoing, the trial court sentenced Defendant to fifteen years for his attempted second degree murder conviction. The trial court also sentenced Defendant to eleven months, twenty-nine days for his misdemeanor assault conviction. The trial court found that consecutive sentencing was warranted because Defendant was a professional criminal and because of his extensive record of criminal activity. *See id*. § 40-35-115(b)(1), (2).

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo. State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App.1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App.1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, which became effective June 7, 2005. However, although Defendant was sentenced after the effective date of the Act, Defendant's crimes in this case occurred prior to June 7, 2005, and Defendant did not elect to be sentenced under the provisions of the Act by executing a waiver of her ex post facto protections. *See* 2005 Tenn. Pub. Acts ch. 353 § 18. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

Defendant does not challenge his range classification for sentencing purposes. Defendant was convicted of attempted second degree murder, a Class B felony. As a Range II multiple offender, he is subject to a sentence of between twelve and twenty years. T.C.A. § 40-35-112(b)(2). In calculating the sentence for a Class B felony conviction, the presumptive sentence is the minimum

of the range, or twelve years, if there are no enhancement or mitigating factors. *Id*. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum of the range, but still within the range. *Id*. § 40-35-210(d). If both enhancing and mitigating factors are present, the trial court must start at the minimum of the range, enhance the sentence within the range as appropriate for the enhancing factors, and then reduce the sentence as appropriate for the mitigating factors. *Id*. § 40-35-210(e).

The trial court found the presence of two enhancement factors based on Defendant's prior criminal convictions and his previous unwillingness to comply with the conditions of a sentence involving release into the community. *Id*. § 40-35-114(2), (9). In *Blakely* ,the United States Supreme Court concluded that other than a defendant's prior convictions, the "'statutory maximum' for *Apprendi [v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000),] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537. Subsequently, in *State v. Gomez,* 163 S.W.3d 632, 661 (Tenn. 2005), a majority of our state supreme court concluded that, unlike the sentencing scheme in *Blakely*, "Tennessee's sentencing structure does not violate the Sixth Amendment." However, the United States Supreme Court recently vacated our supreme court's ruling in *Gomez* and remanded the case for reconsideration in light of its recent decision in *Cunningham v. California*, --- U.S. ----, 127 S.Ct. 856 (2007). Given the Supreme Court's directive, we no longer feel compelled to follow *Gomez* and conclude that the trial court's application of enhancement factor (9) violated the dictates of *Blakely*. *See State v. Mark A. Schiefelbein*, No. M2005-0166-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 213, at *2-3 (Tenn. Crim. App., at Nashville, Mar. 7, 2007), *perm. to appeal denied* (Tenn. June 18, 2007) (concluding upon a petition for rehearing that "*Cunningham* did apply the *coup de grace* to the rational employed in Tennessee's pre-2005 sentencing law").

Thus, under the directives of *Blakely*/*Cunningham*, "[o]ther than the fact of a prior conviction any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakey*, 542 U.S. at 301, 124 S.Ct. at 2536 (quoting *Appendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000)). Accordingly, the application of enhancement factor (2), which was based upon the appellant's numerous prior convictions, does not violate *Blakely*. Moreover, given the appellant's extensive criminal history, we conclude that even if the application of enhancement factor (9) was error, the application of enhancement factor (2) was entitled to sufficient weight and warrants the fifteen-year sentence. Defendant is not entitled to relief on this issue.

The trial court ordered Defendant to serve his sentence for his attempted second degree murder conviction consecutively to his life sentence upon its findings that Defendant is a professional criminal and that his record of criminal activity is extensive. T.C.A. § 40-35-115(b)(1), (2). Defendant does not challenge the trial court's finding as to the applicability of these factors but argues that the trial court erroneously believed that the imposition of consecutive sentencing was mandatory rather than discretionary. Defendant additionally argues that the imposition of consecutive sentences is unconstitutional under *Blakely*.

As to Defendant's *Blakely* challenge, we note that the United States Supreme Court's decisions in *Blakely* and *Cunningham* do not affect our review of consecutive sentencing issues. Before its decision in *Gomez,* our supreme court had specifically noted that *Blakely* did not impact our consecutive sentencing scheme. *State v. Robinson,* 146 S.W.3d 469, 499 n.14 (Tenn. 2004). In addition, this Court has consistently found that *Blakely* does not affect consecutive sentencing determinations. *See State v. Rose Marie Hernandez*, No. M2003-01756-CCA-R3-CD, 2004 WL 2984844, at *4 (Tenn. Crim. App., Nashville, Dec. 16, 2004), *perm. to appeal denied* (Tenn. May 23, 2005); *State v. Earice Roberts,* No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *15 (Tenn. Crim. App., Jackson, Nov. 23, 2004), *perm. to appeal denied* (Tenn. Mar. 21, 2005); *State v. Lawrence Warren Pierce,* No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *16 (Tenn. Crim. App., Nashville, Nov. 9, 2004), *perm. to appeal denied* (Tenn. Feb. 28, 2005).

The trial court's decision to impose consecutive sentencing is discretionary upon the finding of one or more specifically enumerated criteria. T.C.A. § 40-35-115(b)(noting that the trial court *may* order consecutive sentencing); *see also id.*, Sentencing Commission Comments (noting that where appropriate, consecutive sentences are authorized in the discretion of the court unless consecutive sentences are mandated by statute or Tenn. R. Crim. P. 32).

At the conclusion of Defendant's sentencing hearing, the trial court found:

> [n]ow, we get down to section 40-35-115 with regard to multiple convictions and the Court has to look at that. And again, the Court just has guidelines that the Court is to follow. And the statute is very clear on what it tells me I must do. There are certain things that I must consider. The Court has looked at it and under 40-35-115, one applies, he has a, he's a professional criminal. Two he is, his record is extensive and that's all, those are just the facts that this Court can't change. They are in the record.

Taking the trial court's findings in context, we do not believe that the trial court was under the mistaken impression that the imposition of consecutive sentences was mandatory once the trial court determined that one or more of the statutory factors is supported by the record. The trial court considered those factors enumerated in Tennessee Code Annotated section 40-35-115(b) and found that the record clearly supported a finding that Defendant was a professional criminal and that he has an extensive criminal history. When a Defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of seven categories listed in Tennessee Code Annotated section 40-35-115.

Having reviewed the record, we conclude that the trial court did not abuse its discretion in ordering the imposition of consecutive sentences and that the length of Defendant's sentences are "justly deserved in relation to the seriousness of the offense[s]" and are "no greater than that deserved for the offense[s] committed." T.C.A. §§ 40-35-102(1) and 40-35-103(2). Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgments of the trial court.

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THOMAS T. WOODALL, JUDGE